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In the

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

DEDRA SHANKLIN, INDIVIDUALLY AND AS NEXT FRIEND OF JESSIE GUY SHANKLIN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICUS CURIAE* OF THE STATES OF NORTH CAROLINA, CALIFORNIA, COLORADO, ILLINOIS, KANSAS, MINNESOTA, MISSOURI, NEVADA, NEW MEXICO, OKLAHOMA, RHODE ISLAND, AND WEST VIRGINIA, IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE*

Amici curiae, the listed State Attorneys General, respectfully submit this brief in support of Plaintiff-Respondent Dedra Shanklin. Amici have a strong interest in preserving a proper balance of power between States and the federal government. Among the most basic powers of State government is the establishment of laws designed to safeguard the public health, safety, and welfare. And among the most important of those laws is the common law of negligence.

While State and federal regulations can encourage safe behavior, tort law provides a critical additional deterrent to industry actions which jeopardize citizen safety – and it is often the only compensation for injured citizens.

The number of citizens killed and injured in crossing accidents throughout this country is unacceptably high. Every 90 minutes, a vehicle and a train collide at one of this country's 290,000 highway-rail grade crossings. In 1994, more than 600 people died, and more than 1,900 were injured as a result of such crashes. By inappropriately invoking the doctrine of federal preemption, petitioner's position threatens citizens' ability to obtain redress for their injuries and would reduce railroads' incentive to make railroad crossings safe enough to protect them in the first place.

STATEMENT OF THE CASE

A. RAILROADS HAVE TRADITIONALLY HAD A STATE LAW DUTY TO PROVIDE ADEQUATE WARNING DEVICES AT GRADE CROSSINGS.

Dating back to the earliest days of rail travel, this Court has recognized a common law duty of railroads to warn highway travelers about the hazards of railway-highway grade crossings. *See Continental Improvement Co. v. Stead*, 95 U.S. 161, 164 (1877) (approaching train must give "reasonable and timely warning" to the traveling public). If a crossing is more than ordinarily hazardous, a railroad must take such actions as dictated by reasonable care and prudence, which may require placing a flagman or providing additional warning devices, such as gates. *Grand Trunk Ry. Co. v. Ives*, 144 U.S. 408, 416-420 (1892); *see generally* 74 C.J.S. § 728 (1951). Even against

the modern federal regulatory backdrop, a railroad is presumed to retain its "duty to take all reasonable precautions to maintain grade crossing safety." *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 665 n.5 (1993).

The Federal Railroad Administration (FRA) has expressly acknowledged railroads' common law duty to provide warnings. In 1978, the FRA's annual report acknowledged "the current practice of railroads assuming total liability for rail-highway crossing accidents." 1978 Annual Report by the President to the Congress on the Administration of the Federal Railroad Safety Act of 1970, at 33-34. In 1995, the FRA proposed an administrative rulemaking to remove railroads' common law duty to select safety devices. In its notice of proposed rulemaking, the FRA wrote:

> Some state laws, generally predating the advent of the Federal Rail-Highway Crossing Program, impose a tort law duty upon railroads to maintain safe crossings. In some cases this duty has been interpreted to include a duty to select and install warning systems at hazardous crossings.

Selection and Installation of Grade Crossing Warning Systems; Notice of Proposed Rulemaking, 60 Fed. Reg. 11,649, 11,651 (March 2, 1995). After significant public outcry, the agency decided not to disturb the common law and withdrew the proposed rule, stating that "[t]ermination of this rulemaking is based on public comments and FRA's determination that railroad safety will not be best served by issuance of such a regulation at this time." Selection and

Installation of Grade Crossing Warning Systems; Termination of Rulemaking, 62 Fed. Reg. 42,733 (August 8, 1997).

B. FEDERAL FUNDING OF RAILROAD CROSSINGS.

In 1973, Congress first appropriated funds to improve safety at railway-highway crossings which were not a part of the federal highway system. Highway Safety Act of 1973 (HSA), Pub. L. No. 93-87, 87 Stat. 282. At that time, Congress appropriated $150 million for fiscal year 1974 and $225 million each for fiscal years 1975 and 1976 for the states to distribute for crossing upgrades. *Id.* These funds, and funds authorized in subsequent years, were appropriated on the condition that states develop programs that, at a minimum, would provide signs at all crossings, and would also survey site conditions at all crossings to prioritize more substantial upgrade projects. *Id.* Now codified at 23 U.S.C. § 130(d), the federal conditions provide:

> Each State shall conduct and systematically maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose. At a minimum, such a schedule shall provide signs for all railway-highway crossings.

23 U.S.C. § 130(d).

This subsection created two programs, commonly called the "minimum" program and the "priority" program. The "minimum" program is set forth in the second sentence of § 130(d). By requiring each crossing in the nation to have

crossbuck signs, this provision establishes a minimum, or floor, with which every crossing must comply. The "priority" program, described in the first sentence of § 130(d), requires states to compile information about crossings and develop lists of the crossings most in need of safety upgrades. Regulations implementing and further describing this program are codified at 23 C.F.R. Part 924.

Regulation 23 C.F.R. § 646.214(b)(3) attaches a further condition on federal crossing upgrade funds. It requires that in the presence of certain site conditions, federally funded projects must include automatic gates with flashing light signals, unless the FHWA approves otherwise.[1] Because this regulation

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[1] In pertinent part, the regulation reads:

(3)(I) *Adequate warning devices*, under § 646.214(b)(2) or on any project where Federal-aid funds participate in the installation of the devices are to include automatic gates with flashing light signals when one or more of the following conditions exist:

(A) Multiple main line railroad tracks.

(B) Multiple tracks at or in the vicinity of the crossing which may be occupied by a train or locomotive so as to obscure the movement of another train approaching the crossing.

(C) High Speed train operation combined with limited sight distance at either single or multiple track crossings.

(D) A combination of high speeds and moderately high volumes of highway and railroad traffic.

(E) Either a high volume of vehicular traffic, high number of train movements, substantial numbers of schoolbuses or trucks carrying hazardous materials, unusually restricted sight distance, continuing accident occurrences, or any combination of these conditions.

(F) A diagnostic team recommends them.

23 C.F.R. § 646.214(b)(3)(I).

applies to "any project where Federal-aid funds participate in the installation of the devices," it acts as a condition on federal money, just as Part 924 regulations do. States are to receive federal money for crossing upgrades only if the upgrades conform to the regulation. In this way, the Federal Highway Administration retains some oversight over the federal expenditures. Whereas the Part 924 regulations condition federal spending on implementing certain procedures, subsection 646.314(b)(3) conditions federal spending on having a certain level of safety devices.

Under the Federal Railroad Safety Act of 1970 (FRSA), regulations adopted by the Secretary of Transportation – including regulations adopted pursuant to the HSA – can preempt state law. Specifically, the FRSA provides:

> Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety when the law, regulation, or order –
>
> (1) is necessary to eliminate or reduce an essentially local safety hazard;
>
> (2) is not incompatible with a law, regulation, or order of the United States
>
> Government; and
>
> (3) does not unreasonably burden interstate commerce.

49 U.S.C. § 20106.

C. THE FACTS OF THIS CASE.

In 1987, federal highway funds appropriated under the HSA minimum protection program were used to install reflectorized crossbucks and advance warning signs at the Oakwood Church Road Crossing, in Gibson County, Tennessee. J.A. 102-103. On October 3, 1993, Eddie Shanklin was driving his car across the crossing when he was struck and killed by a Norfolk Southern train. His widow, plaintiff-respondent Dedra Shanklin, filed a state law negligence claim in diversity jurisdiction, alleging, *inter alia*, that "Norfolk Southern failed to provide an adequate warning system or protective devices at the crossing in question, though they were aware of the ultra or extra hazardous local condition and its inherent danger to the unsuspecting motorist expected to use said crossing." J.A. 31.

The crossing did not have active warning devices such as automatic gates and flashing lights, despite the presence of multiple conditions which 23 C.F.R. § 646.214(b)(3) identifies as requiring gates and lights. The district court found:

> The record in this case shows that at least some of the (b)(3) conditions appear to exist at the Oakwood Road crossing. These conditions include high speed train operations combined with limited sight distance, moderately high railroad and highway traffic, trucks carrying hazardous materials, and a prior collision at the crossing.

Cert. Pet. 35A. Petitioner-defendant Norfolk Southern was found 70% negligent at trial. J.A. 47. The verdict was affirmed by the United States Court of Appeals for the Sixth Circuit. Cert. Pet. 1A.

SUMMARY OF ARGUMENT

In an effort to reduce deaths and injuries from trains at railway-highway grade crossings, the Federal Highway Administration (FHWA) provides funds to upgrade warning systems at railway grade crossings in the States. To ensure good stewardship of taxpayers' money, the FHWA sets a "floor," or minimum level, of protection which funded upgrades must meet. At particularly dangerous crossings, the FHWA requires automatic gates with flashing light signals.

Under the applicable statute, Department of Transportation regulations which "cover the subject matter" of state law can preempt state law. The FHWA's regulations do not preempt plaintiff-respondent's state law tort claim of failure to provide adequate warning devices because they do not cover its subject matter.

The regulations do not address railroads' independent and ongoing common law duty of care to provide adequate warning devices at all crossings, including those which have received federally funded upgrades. The regulations' scope is limited to the requirement that crossings be equipped with certain safety devices if federal funds are disbursed. They do not remove railroads' preexisting common law duty of care to the traveling public, which may require safety devices beyond those which have been installed with federal funds.

The regulations do not establish a standard of care which preempts the common law standard. The regulations' use of the term "adequate warning devices" is limited to the funding context in which the regulations operate. While compliance with a federal regulatory guideline is relevant evidence that a railroad has met a standard of care, it is not dispositive. Liability is determined based on the particular facts of individual cases.

Petitioner Norfolk-Southern Railway Company urges the inequitable rule that the existence of a federal program encouraging installation of safety devices at railroad crossings should immunize railroad companies from liability for tortious conduct at crossings which do not even meet the federal requirements. Such a rule is contrary to congressional intent of enhanced safety and is unsupported in law.

ARGUMENT

FEDERAL LAW DOES NOT PREEMPT RAILROADS' COMMON LAW DUTY TO PROVIDE ADEQUATE WARNING DEVICES.

A. NORFOLK SOUTHERN'S POSITION WOULD DRAMATICALLY IMPAIR THE ABILITY OF INJURED PERSONS TO OBTAIN REDRESS, A CONCERN NOT BEFORE THE COURT IN *EASTERWOOD*.

Petitioner Norfolk Southern contends that railroads' longstanding common law duty to provide necessary warning devices at rail crossings is preempted by the federal regulations which require that, when federal funds participate, automatic

gates and flashing light signals must be installed at certain sites. According to Norfolk Southern, railroads no longer have any duty to provide warning devices at any crossing that has received federal funds. At the outset, the extraordinary harmful ramifications of petitioner's position must be understood. If Norfolk Southern's position is adopted:

- One-time federal funding of crossbucks – the "minimum" statutory protection – would immunize railroads from liability, even where railroads breached their common law duty of care by failing to provide safety devices necessary to protect public safety.
- Expenditure of federal money designed to improve crossing safety would have the opposite effect. It would take away railroads' responsibility to upgrade safety devices, regardless of changes in conditions, such as increased traffic and reduced line of sight, which could render a crossing extra-hazardous. This immunity would remove railroads' incentive to ensure the continued safety of their crossings.
- Persons injured due to railroads' failure to provide adequate warning devices would have no remedy whatsoever because the federal regulations provide no alternative remedy to the state law remedies.
- Expenditure of federal funds would preempt not just tort law but *any* state authority recognizing railroads' role in crossing protection. For example, if a state identified a class of crossings at which crossbucks were insufficient to prevent grave risk to its citizens' safety (*e.g.*, crossings where vehicle approach is greater than 40 miles per hour), a state regulation requiring railroads to upgrade such

crossings would be preempted -- even where federal money had funded only minimal crossbucks.[2]

In defense of its position, Norfolk Southern relies heavily on the statement in *Easterwood* that the regulations "cover the subject matter of state law which, like the tort law on which respondent relies, seeks to impose an independent duty on a railroad to identify and/or repair dangerous crossings." 507 U.S. at 671. That statement was dictum, however, for the Court concluded that federal funds did not participate at the crossing at which Thomas Easterwood was killed. Moreover, *Easterwood*'s dictum was based on the assumption that federal money would have funded the gates and lights required under 23 C.F.R. § 646.214(b). However, in this case, federal money funded only the minimum crossbuck protection. This case therefore raises a question unanswered by *Easterwood*: Can a state law inadequate warning devices claim be preempted where federal funds participated but did not pay for gates and lights?

Because *Easterwood* did not involve the participation of federal funds, the plaintiff was free to pursue her state law cause of action, and this Court did not have to decide whether to interpret the FRSA preemption provision and HSA regulations in a manner that deprives plaintiffs of their sole

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[2] The preemption provision contains a "local hazard" exception, which preserves state authority at crossings where specific local safety hazards can be identified. However, *Easterwood* made clear that the local hazard exception only applies to "unique local conditions" and does not apply to broader categories, such as a class of crossings with similar characteristics. 507 U.S. at 675.

remedy. This case presents that very possibility, and warrants a fresh examination of the intended scope of the federal regulations at issue.

In undertaking that examination, several well-established background principles must be kept in mind. First, where preemption would leave injured individuals without any state or federal remedy, a court may find preemption only in the most compelling circumstances. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984). This Court has recognized the validity of state tort remedies in areas involving particular hazards to human health, even where extensive federal regulations exist. *Silkwood* (nuclear power); *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996) (medical devices). The heavy federal regulation of rail transportation demonstrates its hazardous nature.[3] Barring railroad victims from compensation would "have the perverse effect of granting complete immunity from . . . liability to an entire industry that, in the judgment of Congress, needed more stringent regulation. . . ." *Medtronic*, 518 U.S. at 487.

Furthermore, when considering preemption by regulation, courts should be reluctant to preempt state law without evidence of a very clear and specific intent, since agencies typically address topics in detail. *Hillsborough County, Fla. v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 718 (1985). *See also Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981), quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132,

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[3] *See* 49 C.F.R. §§ 200-399.

142 (1963) ("Pre-emption of state law by federal statute or regulation is not favored 'in the absence of persuasive reasons -- either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.'") Absent any express statement, the Court should not interpret the regulations to abrogate tort claims.

B. FEDERAL REGULATIONS DO NOT COVER THE SUBJECT MATTER OF RAILROADS' DUTY TO PROVIDE ADEQUATE WARNING DEVICES.

Under 49 U.S.C. § 20106, state law can be preempted when the Secretary of Transportation promulgates a regulation "covering the subject matter" of that law. This Court has interpreted the § 20106 term "covering" as a restrictive term "which indicates that pre-emption will lie only if the federal regulations substantially subsume the subject matter of the relevant state law." *Easterwood*, 507 U.S. at 664. The Court added, "The term 'covering' is in turn employed within a provision that displays considerable solicitude for state law in that its express pre-emption clause is both prefaced and succeeded by express savings clauses." *Id.* at 665.

The core legal issue in this case is whether 23 C.F.R. § 646.214 "cover[s] the subject matter" of railroads' state law duty to provide adequate warning devices. It does not. To find otherwise would be contrary to the structure and purpose of the federal grant program and would lead to inimical results that should be read into a regulation only when the language unequivocally mandates such a reading.

1. The Federal Regulations at Issue Only Limit the Use of Federal Funds; They Do Not Speak to or Cover Railroads' Independent Duty of Care.

a. Subsections 646.214(b)(3) and (4) are limited to the requirement that where federal funds are used, and specified site conditions exist, certain warning devices must be installed. There is no basis to conclude that their scope extends to eliminating railroads' common law duty at railway-highway grade crossings. In contending otherwise, Norfolk Southern insists that any decision guided by the federal program is a duty removed from the railroads and therefore "covered" by the regulation. This view erroneously conflates two separate concepts: A railroad's duty under the federal program and a railroad's duty at a crossing.

It is a basic tenet of the common law of railroad negligence that railroads' duty of care is a concept independent of and extending beyond requirements imposed by statute, administrative rule, or order. "[T]he fact that statutory requirements are fully complied with does not prevent a finding by the jury that the railroad was negligent in not providing additional warnings or signals." 65 Am. Jur. 2d § 509 (1972). *See also Pokora v. Wabash Ry. Co.*, 292 U.S. 98 (1934) (Compliance with statute does not relieve railroad from taking additional precautions necessary for crossing safety). Consistent with this principle, railroad companies' duty of care at individual crossings exceeds the scope of the funding regulation. A program that funnels federal dollars to states for implementation of certain safety devices is not equivalent to a

federal determination that railroads have no further, independent duty to warn citizens at those crossings.

The regulation only addresses the responsibility of federal funds recipients to place a certain level of protection with federal money. *See* 23 C.F.R. § 646.200 (The purpose of the regulations is "to prescribe policies and procedures for advancing Federal-aid projects involving railroad facilities.") This scope is much narrower than the duty of a railroad to ensure that its crossings are safe for the traveling public. That duty includes an independent judgment of the safety devices necessary at each individual crossing, given the particular characteristics of each crossing.

In order for Norfolk Southern to maintain that the regulation removes railroads' common law duty to install necessary safety devices at federally funded crossings, it would have to demonstrate that the regulation actually prevents railroads from doing so. No such showing can be made. To the contrary, the plain text of the regulation clearly envisions that railroads will be involved in the selection and installation process. *See, e.g.*, 23 C.F.R. § 646.214(b)(4) ("For crossings where the requirements of § 646.214(b)(3) are not applicable, the type of warning device to be installed, whether the determination is made by a State regulatory agency, State highway agency, *and/or the railroad*, is subject to the approval of FHWA") (emphasis added); 23 C.F.R. § 646.204 (defining "diagnostic teams," which guide device selection pursuant to § 646.214(b)(3), as "a group of knowledgeable *representatives of the parties of interest* in a railroad-highway crossing or a group of crossings.") (Emphasis added).

Even for crossings where the railroad was not involved in device selection, there is no evidence that the railroad is prohibited from exercising its duty, where necessary, to place safety devices at federally funded crossings. On its face, the regulation does not circumscribe railroad action. The only action preempted by the regulation is the use of federal funds to install lesser safety devices than those prescribed. The regulation does not prevent, either explicitly or implicitly, the railroad from placing safer devices at crossings which have received federal money.

Railroads' ability to provide their own safety devices is borne out in reality. At trial, state crossing program officials from both Tennessee and Georgia testified that railroads were permitted unilaterally to place safety devices at crossings, even where federal funds had already been expended. Mr. William Cantrell, administrator of Tennessee's minimum protection and priority listing programs (J.A. 98), testified that if Norfolk Southern had offered to erect gates and lights at the Oakwood Church Road crossing with its own funds, "We would have taken that deal in a heartbeat." J.A. 108-109. Mr. Archie Burnham, a retired Georgia transportation official and former chair of a national rail highway grade crossing committee (J.A. 70), also testified that the Georgia Department of Transportation would accept such an arrangement. "Certainly. The state will accept candidates that are not on their priority list if they're paid for with other funds than what the state has to pay." J.A. 97. Norfolk Southern itself has acknowledged this reality. In an introduction to its "Corporate Policy on Highway/Railway Crossing Safety," Norfolk Southern

President D.R. Goode stated, "[W]e must actively identify and correct crossing hazards on our lines." J.A. 124.

Where a railroad determines, through expertise gathered by its own inspection and monitoring, that existing devices are not sufficient to meet a common law standard of due care, the railroad must place additional safety devices at the scene. A railroad should not be permitted to endanger its employees, passengers, and highway motorists by allowing a known hazard with an insufficient level of protection to continue simply because the existing devices, undisputably minimal, were federally-funded.

b. Given the far-reaching and deleterious consequences that flow from Norfolk Southern's position, only the clearest of statutory or regulatory language would warrant its adoption. But not 23 C.F.R. § 646.214, the HSA, nor the FRSA contain language that addresses railroads' common law duties, let alone the elimination of those duties. Such silence is especially telling given that these laws provide no means for a victim injured at a railroad crossing to assert a claim in negligence and receive compensation from a tortfeasor. The FRSA provides a panoply of mechanisms through which to enforce railroad safety regulations, including civil penalties, injunctions, and compliance orders, 49 U.S.C. § 20111, with enforcement muscle provided by the Attorney General. 49 U.S.C. § 20112. Yet the FRSA does not address state common law claims nor provide a third party remedy for injured persons. And the HSA, as a federal Spending Clause program, speaks only to the conditions imposed upon states if they wish to receive the funds.

2. The Federal Regulations at Issue Do Not Cover the Subject Matter of the Scope of Railroads' Duty of Care at Crossings.

a. Norfolk Southern contends the FHWA regulations govern the matter of "adequacy of the [warning] devices" (Br. at 25), implicitly suggesting that the regulations establish a federal standard of care at crossings that supersedes any conflicting state regulation (common law or otherwise). Although § 646.214 uses the term "adequate warning devices," it does not purport to establish a standard of care, i.e., a level of protection which is "adequate" for purposes of discharging railroads' duty of care to the traveling public. The only definition of "adequate" supported by the §§ 646.214(b)(2) and (3) context is "of sufficient safety to warrant federal funding."[4]

It is apparent from its context that the term "adequate warning devices" does not establish a standard of care. The requirement for installation of "adequate warning devices" appears in the context of the federal funding program of §§ 214(b)(2) and (3). The provision states: "Adequate warning devices, under § 646.214(b)(2) or on any project where Federal-aid funds participate in the installation of the devices are to *include* automatic gates with flashing light signals when one or more of the following conditions exist. . . ." 23 C.F.R. § 646.214(b)(3)(I) (emphasis added). The use of the word "include" indicates that in particular cases, gates and lights may not be, in and of themselves, "adequate." Thus, the regulations

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[4] Of course, in a proceeding to determine whether a railroad met a standard of due care, compliance with the federal standard would generally be relevant evidence.

expressly do not foreclose the possibility that further safeguards may be needed at a particular crossing to meet a railroad's standard of care.

In contrast, 23 C.F.R. § 646.214(b)(1), a much broader provision and the only subsection within § 646.214 that establishes an absolute requirement for federally funded crossings, expressly leaves open the possibility of stricter state standards. This subsection requires all "traffic control devices" to "comply with the latest edition of the Manual on Uniform Traffic Control Devices for Streets and Highways *supplemented to the extent applicable by State standards*." 23 C.F.R. § 646.214(b)(1) (emphasis added). The regulation plainly intends and expects that state law will impose additional duties at railroad crossings.

b. Standards set forth in a federal statute or regulation do not necessarily establish a negligence standard of care, because a common law standard of care can extend beyond the regulatory standard. A general regulation sets a floor below which protection may not drop, not a ceiling above which it may not rise. *California Federal Savings and Loan Assn. v. Guerra*, 479 U.S. 272, 280 (1987). *See also Hillsborough County, Fla. v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 717 (1985) ("[M]erely because the federal provisions were sufficiently comprehensive to meet the need identified by Congress did not mean that States and localities were barred from identifying additional needs or imposing further requirements in the field.") This rule has been applied directly in the railroad safety context. *Grand Trunk Ry. v. Ives*, 144 U.S. 408, 421 (1892) (A statutory requirement does not

establish sufficient precautions, and additional safety devices must be provided to the extent necessary). In the case of §§ 646.214(b)(3) and (4), the regulation sets a floor. At a railroad crossing involving multiple main line railroad tracks, or a high speed train operation combined with limited sight distance, or any of the other 646(b)(3) conditions, anything less than automatic gates with flashing light signals would not be adequate and would not qualify for federal funding.

The individualized nature of railroad crossings further compels the conclusion that the general regulation cannot establish a standard of care. Unlike consumer products, for example, for which nationwide standards can be set, see *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), every railway-highway intersection is different. Each has a different traffic pattern and differing levels of visibility, depending on factors such as terrain and nearby buildings, which can partially obscure lines of sight. An individual railroad crossing, with its particular circumstances, may well require more protective warning devices than those prescribed by a general regulation. Given the unique nature of each railroad crossing, it is implausible that Congress intended the Secretary of Transportation's regulations to establish a standard that would always and in every case be a sufficient level of safety to fulfill a railroad's duty of care.

Congress' stated purpose in enacting the Federal Railroad Safety Act of 1970 was "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C. § 20101. The federal goal of safety is

enhanced by state tort liability which gives railroads an incentive to upgrade their crossings.

Railroad engineering is continually developing improvements in the area of crossing safety. In addition to gates and lights, crossings may be equipped with double gates, highly reflectorized signs (against which the passage of a train creates an eye-catching "strobe" effect), cantilevering (extending lights on posts over traffic lanes), and traffic signal preemption (which links traffic semaphores to crossings so a train's approach triggers a red light for motorists). Indeed, under its "sealed corridor" program, the State of North Carolina is currently installing crossing devices that are more protective than gates and alarms. The program is designed to prevent motorists from trying to "beat the train," and includes placement of median barriers with posts, extra-long gate arms, and four-quadrant gates, in which gates are placed across both lanes of traffic on both sides of the intersection.[5] These innovations are not preempted by the federal law; in fact, they are encouraged and funded by the federal Department of Transportation. However, under the immunity requested by Norfolk Southern, railroads would lose all incentive to implement new technologies and continue making crossings safer.

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[5] A description of this program is posted at the North Carolina Department of Transportation's web site at http://www.bytrain.org/safety.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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